

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ROBERT SMITH,
Petitioner,

No. C 14-3122 RS (PR)

ORDER TO SHOW CAUSE

v.

RON DAVIS, Warden,
Respondent.

INTRODUCTION

Petitioner seeks federal habeas relief from his state convictions. The petition for such relief is now before the Court for review pursuant to 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases. Respondent shall file a response to the petition on or before March 15, 2014, unless an extension is granted.

The petition is likely untimely. Petitioner was sentenced in 1996 and the instant petition was filed 18 years later, in 2014. Respondent is directed to consider first whether a motion to dismiss on grounds of untimeliness is the most appropriate first response to the petition. If he so concludes, he may file a motion to dismiss, though he is not required to do so.

BACKGROUND

According to the petition, in 1996, a Contra Costa County Superior Court jury convicted petitioner of first degree murder, attempted voluntary manslaughter, child endangerment, personal use of a firearm, personal use of a handgun, and being armed with a

1 firearm. He was sentenced in 1996 to a term of 44 years and 2 months in state prison.

2 DISCUSSION

3 This Court may entertain a petition for writ of habeas corpus “in behalf of a person in
4 custody pursuant to the judgment of a State court only on the ground that he is in custody in
5 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).
6 A district court considering an application for a writ of habeas corpus shall “award the writ or
7 issue an order directing the respondent to show cause why the writ should not be granted,
8 unless it appears from the application that the applicant or person detained is not entitled
9 thereto.” 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in
10 the petition are vague or conclusory, palpably incredible, or patently frivolous or false. *See*
11 *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).

12 As grounds for federal habeas relief, petitioner alleges that (1) an ex parte
13 communication prejudiced the trial court’s ability to remain fair and impartial, in violation of
14 his due process right to a fair trial; (2) he was denied the right to testify on his own behalf;
15 (3) defense counsel rendered ineffective assistance; (5) the trial court’s jury instructions were
16 in error; and (6) the admission of prior act evidence constituted impermissible character or
17 propensity evidence. When liberally construed, these claims are cognizable on federal
18 habeas review.

19 CONCLUSION

20 1. The Clerk shall serve a copy of this order, the petition and all attachments thereto,
21 on respondent and respondent’s counsel, the Attorney General for the State of California.
22 The Clerk shall also serve a copy of this order on petitioner.

23 2. Respondent shall file with the Court and serve on petitioner, within **ninety (90)**
24 days of the date this order is filed, an answer conforming in all respects to Rule 5 of the
25 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not
26 be granted based on petitioner’s cognizable claims. Respondent shall file with the answer
27 and serve on petitioner a copy of all portions of the state trial record that previously have
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1 been transcribed and that are relevant to a determination of the issues presented by the
2 petition.

3 3. If petitioner wishes to respond to the answer, he shall do so by filing a traverse
4 with the Court and serving it on respondent's counsel within **thirty (30)** days of the date the
5 answer is filed.

6 4. In lieu of an answer, respondent may file, within **ninety (90)** days of the date this
7 order is filed, a motion to dismiss on procedural grounds, as set forth in the Advisory
8 Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondent files
9 such a motion, petitioner shall file with the Court and serve on respondent an opposition or
10 statement of non-opposition within **thirty (30)** days of the date the motion is filed, and
11 respondent shall file with the Court and serve on petitioner a reply within **fifteen (15)** days of
12 the date any opposition is filed.

13 5. Petitioner is reminded that all communications with the Court must be served on
14 respondent by mailing a true copy of the document to respondent's counsel.

15 6. It is petitioner's responsibility to prosecute this case. Petitioner must keep the
16 Court and respondent informed of any change of address and must comply with the Court's
17 orders in a timely fashion. Failure to do so may result in the dismissal of this action for
18 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

19 7. Upon a showing of good cause, requests for a reasonable extension of time will be
20 granted provided they are filed on or before the deadline they seek to extend.

21 8. Petitioner's motion (Docket No. 4) for the appointment of counsel is DENIED
22 without prejudice. There is no right to counsel in habeas corpus actions. *See Knaubert v.*
23 *Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986). A district court is authorized under 18 U.S.C.
24 § 3006A(a)(2)(B) to appoint counsel to represent a habeas petitioner whenever "the court
25 determines that the interests of justice so require" and such person is financially unable to
26 obtain representation. The decision to appoint counsel is within the discretion of the district
27 court, *see Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), and should be granted only
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1 when exceptional circumstances are present. *See generally* 1 J. Liebman & R. Hertz, Federal
2 Habeas Corpus Practice and Procedure § 12.3b at 383–86 (2d ed. 1994). Petitioner has not
3 shown that there are exceptional circumstances warranting the appointment of counsel.

4 9. The Clerk shall terminate Docket No. 4.

5 10. The Court notes that the filing fee has been paid.

6 **IT IS SO ORDERED.**

7 DATED: December 9, 2014


RICHARD SEEBORG
United States District Judge

United States District Court
For the Northern District of California